UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOURTH REGION

WYMAN GORDON PENNSYLVANIA, LLC	:	
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	:	
AND	:	CASES 04-CA-182126,
	:	04-CA-186281, and
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	:	04-CA-188990
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RESPONDENT'S BRIEF IN OPPOSITION TO THE CHARGING PARTY'S CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Respondent Employer Wyman Gordon ("Wyman" or the "Company") files this response to the Charging Party's ("Charging Party" or "Union") cross-exceptions to the ALJ's decision. Wyman filed its exceptions on September 17, 2018 and, to the extent that submission addresses issues raised here, Wyman incorporates those arguments herein. Wyman properly withdrew recognition of the Union after receiving a petition signed by the majority of bargaining unit members demanding that it do so. In its submission, the Union not only argues that the ALJ improperly found that a brief delay in the commencement of negotiating over the discretionary wage increase did not taint the petition, but also seeks wage damages for a violation that was withdrawn by the Union and not included in the Complaint. The Union further argues that the ALJ improperly found that minor technical unfair labor practices did not taint the petition and seeks enhanced remedies not properly available in this case. In doing so, the Union makes misrepresentations of the evidence submitted at hearing and disingenuous arguments by attempting to analogize wholly inapposite cases. For these reasons, as well as those set forth below and in Wyman's previously submitted exceptions and brief in support thereof, the Union's cross-exceptions should be rejected by the Board.

I. Wyman's delayed implementation of a discretionary wage increase did not preclude it from adhering to the employees' demand that it withdraw recognition.

The Union argues that, because the employees did not receive a discretionary wage increase on August 1, 2016, Wyman was precluded from withdrawing recognition on November 29, 2016. In support of this argument, the Union relies heavily on *Denton County Electric Cooperative, Inc. d/b/a Co-Serv Electric and International Brotherhood of Electrical Workers Local 220*, 366 NLRB 103 (2018). *CoServ*, however, is easily distinguishable from the facts here and the Union's reliance on that case is disingenuous.

In *CoServ*, the employer had historically provided annual wage increases that were dictated by an annual compensation study conducted by a third party, Mercer Consulting. *See CoServ Electric*, 366 NLRB No. 103. In the year at issue for CoServ, despite a recommendation by Mercer of a 2.3 percent increase, CoServ froze the pay ranges for a class of employees, provided no notice and engaged in no negotiations with the union. *Id.*

In stark contrast, in the instant case there was no specific framework that had previously been utilized by the company in determining the amount of the wage increase; rather, it was entirely discretionary. (Tr. 549:17-22) (Human Resources Manager Brad Georgetti testifying that there was no formula, nor any criteria, on which the annual wage increase amount was based). There can be no dispute that a discretionary increase is a mandatory subject of bargaining and, therefore, Wyman was not simply free to decide on its own what the amount of the increase should be. *See NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870 (1979). Wyman engaged in negotiations with the Union to attempt to reach agreement on the amount of the wage increase, but there is no guarantee the parties would have come to an agreement. Indeed, even after eleven sessions between August and November (almost half the total twenty-five sessions) during which the parties had exchanged ten proposals and counterproposals, they had still not reached an agreement. Again, neither party is required to accept a proposal of the other, or to make concessions. 29 U.S.C. § 158(d); *Fitzgerald Mills Corp.*, 133 NLRB 877, 880 (1961); *J&C Towing Co.*, 307 NLRB 198, 198 (1992).

Contrary to the Union's depiction of the facts here and in contrast to the *CoServ* case, when Kilbert was asked whether Wyman ever stated that it was not intending to provide an August increase, Kilbert testified: "No, I don't think they did. They always—Mr. Grimaldi always said we intend to give it as soon as we agree to it, and we'll make it retro[active] to August 1st." (Tr. 475:3-

13). If anything, it was the Union who failed to negotiate over the wage increase, compelling Wyman to file an unfair labor practice against the Union. (Charge No. 04-CB-085333).

Furthermore, the Union's reliance on *CoServ* is misplaced insofar as the employees were made well aware both by Wyman and the Union that the parties were engaged in negotiations over the wage increase and that any increase was going to be retroactive to August 1. Such was not the case in *CoServ*. In the instant case, on August 26, the employees were notified by the Union that the annual wage increase would be retroactive to August 1. (GC Ex. 6). This message was further reiterated by Wyman in September, and again by the Union in its September 1, September 12, Progress Report June—October 2016, and its October 16, October 26, October 27, November 5, and 2016 Wage Increase Update bargaining briefs. (Er. Ex. 59; GC Ex. 6). Notably, in none of these bargaining briefs does the Union allege that Wyman wrongfully delayed in engaging in negotiations. On the contrary, the briefs imply that the Union's fight for a much higher wage (which should tend to foster affection for the Union) was the reason for the delay, not the timing of when negotiations on the topic started. Employees were therefore consistently assured that whatever the wage increase would be, it would be retroactive. Ultimately, when the wage increase was implemented in December, it was in fact retroactive and the Union withdrew its unfair labor practice charge "alleging that the Employer violated the Act by not distributing annual wage increases on August 1, 2016." (*See* May 1, 2017 Approval of Withdrawal and Decision to Partially Dismiss.)

CoServ is inapposite here. Instead, *Stone Container Corp.*, 313 NLRB 336 (1993), demonstrates that the Board has ruled in the employer's favor where the employer demonstrated a willingness to bargain even where it did not grant a wage increase. In *Stone Container,* the employer had historically provided an annual wage increase in April. *Id.* During its contract

negotiations with the union in late February, the union stated that it wanted to discuss the April wage increase and in late March, the employer notified the union that it could not grant a wage increase for economic reasons. *Id.* The union alleged that the employer had failed to negotiate the annual wage increase. *Id.* However, the union made no specific proposal for an April wage increase and did not raise the issue again during negotiations. *Id.* The Board found that the employer had satisfied its bargaining obligation regarding the April wage increase, and affirmed dismissal of the complaint:

> "Respondent was not proposing to permanently abandon the April wage increases nor declining to bargain over how much of an increase, if any, it should give in April 1989. Rather, the Respondent expressed its willingness to discuss the subject, conducted its "annual wage and benefit survey," and proposed giving no wage increase because, in its view, financial circumstances did not justify one at that time. Further, while the Respondent made its proposal in time for bargaining over the matter if the Union wished to bargain, the Union made no counterproposal concerning the April wage increase, and did not raise the issue again during negotiations."

Stone Container Corp., 313 NLRB at 336.

Wyman did not abandon the annual wage increase nor decline to bargain over the amount of the increase. Accordingly, the ALJ's determination that the delay in bargaining did not taint the petition is proper and should be upheld.

II. The Union is incorrect in its assertion that the ALJ failed to order Wyman to make employees whole for losses caused by its unlawful withholding of an established wage increase.

The Union erroneously asserts that the ALJ should have ordered that the unit employees be made whole for the unlawful withholding of the wage increase. This issue was not before the ALJ. Again, after the wage increase was implemented retroactively in December 2016, the Union withdrew its unfair labor practice charge "alleging that the Employer violated the Act by not distributing annual wage increases on August 1, 2016." (*See* May 1, 2017 Approval of Withdrawal and Decision to Partially Dismiss.) The Union never amended or refiled any unfair labor practice

charge that included that allegation. The only allegation before the ALJ relative to the annual wage increase was whether the delay in negotiating the wage increase tainted the petition demanding withdrawal of recognition.[1] The ALJ properly concluded that, although the parties did not commence negotiating the wage increase until August, the delay did not taint the petition.

Regardless, it would be improper for the ALJ to craft a remedy as suggested by the Union. The Union ignores, but for one footnote, that the employees **were made whole** by the retroactive payment. To the extent the Union finds the amount of the wage increase to be unsatisfactory, it is not within its purview to dictate what the amount should have been.

Tellingly, the Union did not seek backpay or any other specific remedy with regard to the wage increase in its post-hearing brief. On the contrary, the Union only made two specific requests: an affirmative bargaining order and a notice reading. In doing so, it cited *CoServ*, the very same case it now relies upon it its cross-exceptions. Had the Union intended to seek an additional remedy, it should have done so in its post-hearing brief. *See, e.g., Wagoner Water Heater Co., Inc.*, 203 NLRB 518, n.2 (1973) (noting a specific request for lost wages in its post-hearing brief).

III. Wyman's application of its light duty policy did not preclude it from withdrawing recognition.

The Union argues that, although the ALJ determined that the Employer violated the Act by "unilaterally discontinuing the practice of injured employees performing light duty work in October 2016," he erred in failing to conclude that this alleged practice precluded the Employer from withdrawing recognition. The Union is incorrect.

[1] The General Counsel repeatedly stated on the record that the matters before the judge were limited to those allegations contained within the Amended Consolidated Complaint. (Tr. 559:13-16) (responding, "correct" when Your Honor asked, "But you're not alleging that they violated the Act in any respect with regard to anything that's not specifically mentioned in the complaint?") (*See also* Tr. 113:14-25; 114:1-2; 118:25; 119:1; 251:3-5; 494:22-25; 496:23-25; 499:4-8). The Union never objected to this representation.

A. The Union conflates the concept of taint and liability under the Act by relying on a misplaced notion of repudiation.

The Union first avers that because Wyman did not repudiate its alleged discontinuance of the light duty program, the discontinuance tainted the withdrawal. The Union's argument is flawed. As an initial matter, the concept of repudiation applies to the underlying liability attached to a violation of the Act. An employer may relieve itself of liability for unlawful conduct by repudiating the conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (emphasis added). Repudiation is a method of avoiding *liability*, not taint. *See Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (outlining the requirements of repudiation to avoid liability without any reference to withdrawal of recognition or taint). The Union' argument conflates these concepts. The ALJ (albeit erroneously as described below) concluded that while there was no taint, Wyman violated the Act and had not repudiated its conduct regarding the light duty policy. Had the ALJ found otherwise (that Wyman had repudiated), consistent with *Passavant*, there could have been no liability.

B. The Record is clear that Wyman did repudiate.

Nonetheless, Wyman did in fact repudiate its conduct. In order for repudiation to be effective, it "must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.' *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (internal citations omitted). Further, "there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication." *Id.* Finally, the repudiation should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. *Id.*

Here, Wyman's repudiation was timely. Within three days of being sent home, Wyman called all of the affected employees back and made them whole. (Tr. 583:8-16) (ALJ Dec. 13).

Employee Brian Collura and the other affected employees were contacted directly and unambiguously told that they would return to work and be paid for their missed time. Unlike the employer in *Passavant* wherein it waited seven weeks to repudiate its conduct, Wyman here immediately and timely remedied the situation and made clear at the bargaining table that it had made an error and had corrected it.

The Union argues that Wyman did not fully and timely repudiate its conduct by citing the ALJ's decision for the erroneous conclusion that Wyman did not fully compensate the light duty employees for the time off they lost. However, the ALJ did not make this finding. Rather, the ALJ incorrectly stated that "at least" three of the employees were paid for the days off, but that one or two "*may* not have been paid for 1 of the days off." (ALJ Dec. 13) (emphasis added). This ambivalent conclusion is wholly unsupported by the record. Only one witness testified regarding not being paid for one day, Collura. However, the overwhelming evidence suggests that he is incorrect. On cross-examination, Collura testified that it was possible he had been paid for the day in question through workers' compensation. (Tr. 123:14-23). Moreover, Georgetti testified that he verified that all employees were paid, and that he would know with "almost absolute certainty" that Collura's testimony was untrue. (Tr. 584:11-19; 605:3-20). Therefore, the Union's reliance on an unsupported, inconclusive and erroneous statement by the ALJ is improper. Wyman timely repudiated its conduct by bringing the employees back, making the employees whole and informing the Union at the bargaining table that it had done so.

Further, and contrary to the ALJ's finding, Wyman brought the employees back and made them whole *prior* to receiving a ULP on the issue. (Tr. 583:23-25) (Georgetti testifying that one of the reasons the employees were brought back was that they *anticipated* a ULP). This was a voluntary decision made by Wyman. Remedial action that is voluntary with no threat of action by

the Regional Director is indicative of repudiation. *See Passavant* at 139 (distinguishing *Kawasaki Motors Corporation USA*, 231 NLRB1151 (1978)). While Wyman was within its rights to send the employees home under its policy, Wyman knew that the Union was litigious, as Georgetti testified, and therefore preferred to bring the issue to the bargaining table for discussion in the spirit of negotiations. (Tr. 583:23-25; 584:1-2). Indeed, without making any attempt to understand what had happened or to resolve the issue with Wyman first, and failing to recognize that the employees had already been returned to work, the Union filed an unfair labor practice charge. (Tr. 494:14-21). At the next bargaining session, Kilbert acknowledged that the matter had been resolved: "With respect to light duty, it looks like you put everyone back, if so, I don't need that information." (Er. Ex. 3 at 112-113). Here, Wyman's voluntary effort to reverse its conduct is indicative of repudiation.

The Union nevertheless refused to withdraw the ULP and resisted negotiating the matter with Wyman. (Er. Ex. 3 at 112-113). Grimaldi specifically asked Kilbert and his bargaining committee—including Collura—to provide the employee's perspective on how the light duty program could better serve employees. (Er. Ex. 3 at 114). Rather than provide the employees' viewpoint, Kilbert stated that they were not "crying out for a counter" and turned the discussion to military leave when Grimaldi continued to prod the Union for a response. (Er. Ex. 3 at 119).

Wyman's effort to find a workable solution moving forward without infringing on the employees' rights illustrates its effort to publicize the repudiation to the employees involved and to assure to the bargaining unit that Wyman would not, and did not intend to, infringe on their rights. Wyman's attempt to resolve any issues going further was certainly specific in nature, as Wyman attempted to specifically discuss at length a practical solution to the light duty program

moving forward. Further, this effort was free from proscribed illegal conduct. However, the Union refused Wyman's offer and instead minimized the issue, deeming it not worthy of negotiation.

As illustrated above, this case is distinguishable from *Passavant*. Notably, that case dealt with coercion and infringement upon Section 7 rights; the issue in this case is failure to bargain over a policy or practice. Further, in *Passavant*, the employer waited seven weeks—until the eve of the issuance of the complaint—to disavow its conduct. *Passavant* at 139. It did not inform all employees of its retraction, nor did it make any attempt to communicate it to others. *Id.* Conversely, here, Wyman timely and personally contacted each affected employee and unambiguously notified him. Wyman made each whole prior to receiving a ULP and communicated this to all employees through the Union President. Finally, Wyman gave assurances that it intended to come up with a workable solution in terms of applying its light duty policy (despite the Union's refusal to move the discussion forward). *Passavant* is simply inapplicable. Wyman clearly established repudiation. Consequently, the Union's argument fails.

C. <u>There is no evidence that any petition signers who signed on October 14, 2016 knew about the light duty issue.</u>

Next, the Union argues that the ALJ erred in finding that the Employer's application of its light duty policy did not taint the petition to withdrawal recognition because a determinative number of signatures are dated between October 14 and October 26, 2016, "during the period after the unlawful unilateral action but before the Union communicated its success in securing employees' return to light duty." However, the Union fails to provide any further evidence that the light duty program was a factor in the bargaining unit's disaffection towards the Union. This is because the record is void of any such evidence.

The only employee affected by Wyman's application of its light duty program that signed the petition was Bryan Filipkoski, and he signed the petition on October 20, 2016. (Er. Ex. 2) (Tr.

64:18-25). As admitted by the Union in its Brief, this was *after* he was brought back to work and made whole. (Tr. 583:8-16; 601:10-16, 23-25). Whether he was aware at the time that the Union took credit for bringing the employees back to work is immaterial—he was directly involved and therefore well aware that, regardless of the reason, the situation was addressed and remedied.

As for the other petition signers, none of those who testified referenced any knowledge of any changes to the light duty program. Where there is no evidence that the unit employees knew of the alleged unfair labor practice at the time of signing the petition, there can be no causal connection with employee disaffection. *Champion Enter., Inc.*, 350 NLRB 788, 792 (2007).

Such is the case here. There was no massive announcement or Company-wide policy change when the employees were sent home. Rather, the three affected employees were contacted personally and directly. Even though some signatures were obtained on October 14, 2016, there is no evidence in the record that unaffected employees knew that the employees were sent home until after the issue was resolved. That is, when the Union issued its bargaining brief bragging about putting the employees back. (Tr. 583:13-16). This is underscored by the fact that even the Union declined further discussions on the issue, despite Wyman's appeal to do so. The Union viewed this issue as moot. It therefore could not have tainted the withdrawal.

Further and importantly, Wyman's light duty policy explicitly allows for employees without sufficient work to be sent home. (Er. Ex. 1). This is the same policy that has been in effect since prior to the Union election. Therefore, Wyman's application of the same policy, based on the explicitly provided provisions, could not reasonably be imputed on the Union to cause disaffection. Nor could there be long lasting or detrimental effects, as the employees affected were undisputedly put back to work days later, for which the Union took credit. (Er. Ex. 3 at 112-113; GC Ex. 6).

The Union's attempt to establish taint again fails. The ALJ correctly found that Wyman's application of its policy did not taint the petition and should be upheld.

IV. The employees affected by Wyman's application of its light duty policy were made whole.

The Union inexplicably argues that the ALJ erred by failing to order Wyman to make employees whole for losses caused by Wyman's alleged discontinuance of its light duty program. As explained above, however, the employees were in fact made whole. It is undisputed that the employees were put back to work ***within 36 hours***. (Tr. 583:8-16; 601:10-16, 23-25) (emphasis added). The Union relies on the ALJ's ambiguous finding that employees "may not" have been fully reimbursed, which again is wholly unsupported by the record. Collura *admitted* that he might have been paid for the day in question through workers' compensation pay. (Tr. 123:14-23). Had the Union intended to seek backpay, it was it and the General Counsel's burden to establish such damages. The ALJ's decision confirms that neither party did so, as the ALJ merely notes, albeit erroneously, that one or two employees "may not have been paid." (ALJ Dec. 13).

Finally, and perhaps most tellingly, the Union did not request or even reference any such remedy in its post-hearing brief. Had the Union been seeking such a remedy, it should have been included therein. *See, e.g., Wagoner Water Heater Co., Inc.*, 203 NLRB 518, n.2 (1973) (noting a specific request for lost wages in its post-hearing brief). There is certainly no basis for the Union's request at this late date. It should therefore be denied.

V. Wyman's alleged failure to provide information did not preclude it from withdrawing recognition.

The Union argues that Wyman's alleged failure to provide the Union with information precluded it from withdrawing recognition. Specifically, the ALJ found that Wyman failed to provide the health insurance comprehensive plan document and copies of written communications to unit employees announcing or explaining health insurance plans, benefits or contributions

between January 1, 2013 and December 31, 2014. The ALJ acknowledged these communications were provided for 2015 and 2017. (ALJ Dec. 16). Additionally, the ALJ found that Wyman violated the Act by not providing pricing information. However, the ALJ found that none of this affected the Union's loss of majority status. (ALJ Dec. 17). The ALJ's finding in this regard is correct.

A. Not having the health insurance comprehensive plan document and copies of written communications did not prevent the Union from accomplishing its objective.

As an initial matter, Wyman did in fact provide the requested healthcare-related information. (Er. Ex. 61; Tr. 578:9-19; 581:7-21). Regardless, the Union falsely states that Wyman's alleged failure impeded the bargaining process. With regard to the health insurance comprehensive plan document and communications to employees in 2013 and 2014, this information would not have helped the Union in negotiations because the Union refused to negotiate healthcare following Wyman's implementation of the status quo in June 2016.

In April 2016, Wyman notified the Union that the Company's medical insurance carrier was raising rates effective June 1, 2016, and, therefore, Wyman wished to negotiate health insurance prior to the completion of negotiation over language. (Er. Ex. 3 at 36; Tr. 542:15-25; 543:1-8). Given the time sensitive nature of the issue, Grimaldi offered multiple ways of meeting before the end of May to wrap up healthcare, such as by phone or exchanging proposals in between sessions, but Union negotiator Joe Pozza refused Wyman's suggestions. (Er. Ex. 3 at 44, 46). Grimaldi also offered to have a meeting at 7:00 a.m. sometime before the end of May, but Pozza responded that he "[couldn't] guarantee anything." (Er. Ex. 3 at 47). Pozza did not provide any proposals in the interim, nor did he agree to a 7:00 a.m. meeting. (Tr. 673:1-14). The parties failed

to reach agreement prior to June 1, and the Employer maintained status quo – the percentage contributions by Wyman and employee remained the same. (Tr. 546:2-15).

During the next two sessions, on June 13 and July 12, Wyman continued to attempt to negotiate health care, but Pozza stonewalled, insisting that the Union "accepted what was implemented" and refused to engage in further bargaining over the subject. (Er. Ex. 3 at 48-56; Tr. 546:9-10). Wyman's last counter, dated July 12, 2016, remained without response throughout negotiations. (Tr. 545:11-17; Er. Ex. 53).

Significantly, in the Union's "Progress Report June-October 2016," *the Union boasted that it "successfully resisted [the Employer's] proposals, and the Company ultimately only increased premiums for employees by the percentage its costs increased."* (GC Ex. 6) (emphasis added). No other Union bargaining briefs reference negotiating healthcare proposals. Further, not a single Union bargaining brief mentions needing—or being refused—healthcare information. This is in stark contrast to the Union's misrepresentation that the Union notified employees through its bargaining briefs "in at least eight communications" that the Employer was refusing to provide the Union with information the Union needed to bargain. The Union's representation that Wyman's allegedly unlawful refusals were well-publicized among the bargaining unit is similarly false.

Based on the Union's own communications, it had accepted Wyman's proposal and deemed it a success. There is no reasonable basis for concluding that the bargaining unit knew that the Union was allegedly missing healthcare-related information. Accordingly, and consistent with the very precedent cited by the Union, any unlawful refusal to provide the healthcare information did not preclude Wyman's withdraw of recognition. *Champion Enter., Inc.,* 350 NLRB at 788 (concluding that the Respondent's unlawful refusal to provide information did not preclude its withdrawal of recognition because "there was no evidence that the unit employees knew of this

violation at the time they signed the petition."). Accordingly, the ALJ's determination that Wyman's alleged failure to provide healthcare information did not taint the withdrawal should be upheld.

B. The Union was not entitled to pricing information and not receiving it had no impact on negotiations.

The only information Wyman did not provide to the Union was the information related to its competitiveness: the current prices for the five items produced by the facility that realize the greatest revenue; all changes to the prices of the items listed between January 1, 2014, and the present; the labor cost at the facility as a percentage of the price of each of the items listed in as of the current date and as of January 1 of 2016, 2015, and 2014; and the identities of the Company's primary competitors for each of the items listed in and the current prices of their most equivalent products. This is because the Union was not entitled to this information. The ALJ's conclusion to the contrary was in error.

The Union contends that because Grimaldi allegedly referred to the Company's need to be competitive on price in justifying its position on wage increases, the Union was somehow entitled to the above-referenced information. The Union—and the ALJ—are incorrect. Wyman had no obligation to prove it could afford a substantial wage increase, nor was it required to provide competitor information.

The longstanding Board precedent on this issue establishes that a union is not entitled to audit an employer's financial records if the employer claims an unwillingness to pay, versus an inability to pay, in collective bargaining negotiations. *Coupled Products LLC*, 359 NLRB No. 152 (July 10, 2013). An employer's assertion of previous competitive disadvantage "does not, in and of itself, constitute a claim of inability to pay." *NLRB v. Harvstone Manufacturing Corp*., 785 F.2d 570 (7th Cir. 1986). Moreover, an employer's obligation "to provide a union with information by

which it may fulfill its representative function in bargaining does not extend to information concerning the employer's projections of its future ability to compete. We consider that obligation to arise only when the employer has signified that it is at present unable to pay proposed wages and benefits. **We do not equate 'inability to compete,' whether or not linked to job loss, with a present 'inability to pay.'**" *Nielsen Lithographing Co*., 305 NLRB 697, 701 (1991) (emphasis added); *See also Paperworkers (Georgia-Pacific Corp.) v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992) (employer's statements that it was not competitive and wanted to reduce its costs did not trigger duty to furnish information; "[t]he relevant test, ... is to ascertain whether the employer said it 'would not' as opposed to 'could not' pay the employees' proposed demands"); *Facet Enters. v. NLRB*, 907 F.2d 963, 134 LRRM 2609 (10th Cir. 1990), supplemented, 300 NLRB 699 (1990); *Genstar Stone Prods. Co.*, 317 NLRB 1293 (1995) (employer statements such as "the well is dry" did not amount to claim of present inability to pay); *F.A. Bartlett Tree Expert Co.*, 316 NLRB 1312 (1995) (employer's statements that it would not remain competitive if it was forced to unilaterally increase wages did not trigger duty to furnish information).

In this case, the Union mischaracterized Grimaldi's statement: Wyman never stated that the Company must remain competitive on price as a justification for the Company's position as to wages. (Er. Ex. 19) (Tr. 681:5-11). Rather, Wyman made a general reference to competition in American business in general, not specifically Wyman's customers. *Id.* Nor was there any reference ever to Wyman's competitors. *Id.*

As soon as the Union requested the information, Wyman made clear that its position was based on not wanting to provide such an increase, not that it could not. (Er. Ex. 19; Tr. 679:22-25; 680:1-3; 681:21-25; 682:1). Grimaldi specifically reiterated to the Union that he had made a generic reference to American business, but no specific reference to the Company's customers.

(GC Ex. 37). Indeed, the Union explicitly noted in it September 12, 2016 bargaining brief: "The Union asked whether the Company was saying they couldn't afford it, and the Company said 'no.' The only explanation they could offer was they just do not want to pay." (GC Ex. 6) (emphasis on original).

When the Union again requested the information, Grimaldi again made clear that he never referenced a specific increase for the Employer's specific customers, but rather that no customer, generally speaking, would understand a 15% price increase. (Er. Ex. 25; GC Ex. 38). He never stated that Wyman *could not* pay a 15% increase. The ALJ's reliance on this 15% comment as a basis for the Union's entitlement to the information is flawed. As an initial matter, no one other than Kilbert testified that Grimaldi made a specific statement regarding the inability to pass on a 15% increase to the Employer's customers. Tellingly, there is no reference to such a comment in Wyman's comprehensive bargaining notes, or anyone else's. Grimaldi was simply using 15% as an example because at the time, the Union was requesting a $.60 raise, which is roughly a 15% wage increase for the bargaining unit. Grimaldi was reiterating the point that the Employer did not *want* to provide a significant wage increase and certainly did not want to pass along any increase to its customers. (Tr. 679:22-25; 680:1-3; 681:21-25; 682:1). The 15% was merely used as an example, based on the Union's last demand, that no customer in American business generally would understand such an increase.

This position does not trigger an obligation to produce financial information. "The Act does not require employers to be equitable in their dealings with their employees. An employer can be as greedy as it pleases." *Graphic Commc'ns Int'l Union, Local 508 O-K-I, AFL-CIO v. N.L.R.B.*, 977 F.2d 1168, 1171 (7th Cir. 1992) ("The union wanted the company's financial statements in order to establish that the company could afford to continue to pay the wages and

fringe benefits fixed in the current contract. The company mooted the demand by conceding that it could afford them.").

Thus, even if the Union's position was accurate—which it was not—Wyman mooted the request by confirming its position that it merely did not want to pay. *Graphic Commc'ns Int'l Union*, 977 F.2d at 1171. The Union concedes this in its September 12, 2016 bargaining brief. (GC Ex. 6). Accordingly, the Union was not entitled to the requested information. Consequently, Wyman's refusal was proper and the ALJ's decision should be reversed.

The Union's request that the Board find that Wyman's failure to provide this information tainted the petition to withdraw recognition is similarly baseless. There could be no detrimental or lasting effect, as the Union did not need the information. On the contrary, wage negotiations continued. Contrary to the Union's assertion, the pricing information would not have helped the Union in negotiations, as Wyman's specific customer pricing had no bearing on negotiations. Wyman previously explained that it reviewed the local Department of Labor statistics (information that the Company provided the Union) when considering a wage increase, but, as witnesses at hearing repeatedly and consistently testified, there was no specific criteria or formula used to determine the amount. (Tr. 549:17-22; 550:10-12). Accordingly, Grimaldi repeatedly made clear that Wyman was not considering any specific percentage of impact on its prices, nor did it believe it was unable to pay any specific amount. Pricing was simply not a factor in Wyman's position and, as evidenced by the Union's bargaining briefs, the Union was well aware of this.

Similarly, there is no basis for finding a tendency to cause employee disaffection with the Union, as the only communication received by the employees on this topic came from the Union, and it undeniably confirms Wyman's position that they did not *want* to pay a significant increase, but could indeed afford it. (GC Ex. 6). Therefore, any records regarding competitiveness would be

irrelevant. Moreover, it is more likely that this information would harden the employees against Wyman—not the Union—and provide a disincentive to sign the petition. In other words, the Union made clear that Wyman simply did not want to provide a significant wage increase to its employees. Common sense dictates that this would negatively affect employees' views of Wyman, not the Union. Thus, Wyman's refusal could not have tainted the withdrawal and the Union's exception should be denied.

VI. The remedies sought by the Union are improper.

Wyman maintains that any remedy issued by the ALJ is inappropriate because the withdrawal of recognition was proper and refers to its previously filed exceptions and brief in support thereof. Assuming *arguendo* that the withdrawal of recognition was improper, the Union's position that the ALJ did not go far enough is wrong. The Union continues to reply upon distinguishable and wholly inapplicable law to support its arguments.

A. The Union's Demand for a Bargaining Order is Excessive.

As explained in Wyman's Briefs in Support of Exceptions, a bargaining order is not a snake oil cure for whatever ails the workplace *Avecor Inc v. NLRB*, 931 F. 2d 924, 938-39 (D.C. Cir. 1991). It should therefore be prescribed only when the employer has committed a "hallmark" violation of the Act. *Id.* at 934, 936. Here, the ALJ entered a bargaining order requiring that the parties meet for period of six months to negotiate a first collective bargaining agreement. The Union argues that this is an insufficient remedy and rather the parties should be required to meet no less than 24 hours per month for a "reasonable period of time," while submitting monthly progress reports. In support of this position the Union erroneously analogizes this case with the Board's remedy in *Thermico, Inc.*, 364 NLRB 135 (2016) and *All Seasons Climate Control Inc.*, 357 NLRB 718 (2011). The Union cites a footnote in *Thermico* and argues that the ALJ should

have required a more stringent standard for bargaining because, as in *Thermico*, Wyman "denies the union its rightful status as the employee's representative for an extended period of time."

Thermico is wholly distinguishable from this case. In *Thermico,* the remedy was a result of the employer's failure to overall bargain in good faith and then abide by a settlement agreement wherein it agreed to bargain collectively and in good faith with the union for a period of one year and put in writing any agreement reached on the terms and conditions of employment. *See Thermico.* The employer also agreed to default if it failed to comply. *Id.* The employer in *Thermico,* however, never bargained from day one and continued to refuse to bargain even after agreeing to bargain as part of a settlement agreement. *Id.* The bargaining order was issued only after the Board – after again warning the employer – entered a default judgment when the employer continued to ignore the Union and the Board.

As an initial matter, unlike in *Thermico,* there has been no determination that Wyman overall failed to bargain in good faith[2] and the parties in the instant case engaged in bargaining over a 15-month period, during which they met 25 times and reached 10 tentative agreements. In citing to the footnote in the *Thermico* decision, the Union fails to mention that the Board's remedy was explicitly provided for in the settlement agreement: the agreement stated that, in the event of non-compliance, the Board could issue an Order providing for a full remedy for the violations. *Thermico* at n4. In the *Thermico* decision, the Board makes a point of noting, "…the full remedies granted here closely mirror the remedies in the parties' settlement agreement." *Id*. The Board goes on to state, "in granting the General Counsel's request …we note that it has been more than 1 year since the Union's certification, and 11 months since the Union first requested bargaining, yet

[2] The Regional Director specifically dismissed the Union's overall bad faith bargaining claim on March 1, 2017 and the decision was upheld on appeal.

bargaining has not commenced." *Id.* (Emphasis supplied.) "Instead the respondent: (1) refused the union's request to bargain; (2) abrogated its obligation under a bilateral settlement agreement to bargain; and failed to respond to the union's subsequent bargaining requests." *Id.*

There are no facts in common with Wyman's conduct here, where, in addition to reaching 10 tentative agreements, Wyman exchanged over 80 proposals on significant numbers of topics including interim wages, health care, arbitration, work rules, attendance, etc. (Er. Ex. 63). Wyman only ceased negotiations after it was presented with a petition by a majority of its employees demanding the Company withdraw recognition of the Union. In fact, Wyman was prohibited from continuing bargaining under *Dura Art Stone*, 346 NLRB 149 (2005).

The Union is also misguided in relying on *All Seasons Climate Control Inc*., 357 NLRB 718 (2011). The Union again misleadingly attempts to analogize to a case where the facts are wholly distinguishable from those at hand. Wyman is not alleged to have engaged in the egregious behavior that that the employer in *All Seasons* did. In that case, a bargaining schedule was ordered because the employer had solicited and encouraged an employee to circulate two decertification petitions while first contract bargaining was ongoing and initially refused to bargain or provide *any* information to the union. *All Seasons Climate Control Inc*., 357 NLRB 718. It was not until the Board ordered bargaining and the Order was enforced that the *All Seasons* employer bargained with the union. *Id.* Furthermore, with regard to the employer's failure to provide any information requested by the union in *All Seasons*, the Board merely imposed a cease and desist order. *Id.* In the instant case, the ALJ found that Wyman did provide all information requested by the Union except for a few limited items: the health insurance comprehensive plan document, copies of written communications to unit employees announcing or explaining health insurance plans,

benefits or contributions between January 1, 2013 and December 31, 2014, and certain pricing information.

The Union, citing to *UPS Supply Chain*, 366 NLRB 111 (June 18, 2018), slip op. at 4, also argues that a more severe bargaining schedule should be imposed on the parties because the employer engaged in dilatory tactics in contravention of its duty to bargain in good faith. The Union, blatantly ignoring the dismissal of the overall bad faith bargaining claim and well aware that there was no such claim before the ALJ and that the parties did, in fact, bargain over such issues as healthcare and the annual wage increase, argues that the ALJ found that Wyman refused to bargain over economic issues. The Union's reliance on *UPS Supply Chain* is once again misplaced. In *UPS Supply Chain*, the Board reversed an ALJ decision and found that a bargaining schedule requiring the parties to meet for a minimum of 24 hours per month and 6 hours per bargaining session was appropriate where the employer was found to have acted in bad faith during bargaining where the parties only met three times, the employer insisted that all proposals be in English, even though the parties regularly conducted business and discussed the union's initial Spanish Language contract proposal in Spanish; and, the employer refused to submit any substantive counterproposals written or oral throughout the three bargaining sessions that occurred. *UPS Supply Chain*, 366 NLRB 111. In contrast to the dilatory behavior of the employer in that case, the record establishes that the parties met 25 times, Wyman provided the Union with over 20 proposals in response to the Union's comprehensive proposal, and the parties entered into 10 tentative agreements. Indeed, the judge acknowledged that Wyman and the Union strayed from their own bargained-for ground rules in which they had agreed to discuss language issues before economic issues when they bargained over some economic issues, including healthcare and the employees' interim wage increase (ALJ Dec. 13-14). Furthermore, the record shows through

uncontroverted testimony, despite the ALJ's finding otherwise, that the parties discussed, in detail, the union's comprehensive proposal at the second bargaining session. Also, unlike in *UPS Supply Chain,* Respondent here provided the Union with responses to the Union's multiple information requests, the ALJ found that the only request that Respondent failed to provide related to Respondent's sales and pricing figures but found nevertheless, that the Respondents failure to provide this information to the Union had no relationship to the Union's "alleged loss" of majority status. To suggest, as the Union does, that the Respondent's behavior was analogous to the dilatory conduct described in *UPS Supply Chain* is misguided at best and misleading at worst.

Wyman's conduct was hardly the behavior exhibited by the employers in any of the cases cited by the Union and certainly not so egregious as to rise to the level of a hallmark violation that would require a bargaining order, much less that contemplated by the Union. Former Chairman Miscimarra's dissent in *Thermico, supra,* is instructive: "…. such a remedy is considered by the Board to extraordinary, typically reserved for cases involving pervasive or egregious unfair labor practices." *Thermico, Inc*., 364 NLRB 135 (Miscimarra dissenting, citing *Leavenworth Times*, 234 NLRB 649, n.2 (1978)) (characterizing the requested relief, which included a bargaining schedule as extraordinary"); *Gimlock Construction Inc.*, 356 NLRB 529 (2011) (bargaining schedule imposed after respondent's continuing refusal – over a period of years – to comply with its previous bargaining order); *see also*, *Professional Transportation Inc*., 362 NLRB No. 60 (2015) (imposing bargaining schedule where the respondent had established an impermissible pattern of dilatory conduct by canceling seven consecutive bargaining sessions over a period of two months and insisting to the point of impasse on a conditional bargaining demand). There is nothing in the record to support a finding that Wyman engaged in any such pervasive or egregious conduct.

In the instant case, even if the Board were to agree with the ALJ that Wyman's conduct violated the act in some way, the Board's traditional remedies would be sufficient to correct any unfair labor practices. *Thermico, Inc*., 364 NLRB 135 (Miscimarra dissenting and citing generally, *Frontier Hotel & Casino*, 318 NLRB 857 (2015)).

B. Notice reading is not warranted.

The Union argues in its cross-exceptions that the ALJ erred by not ordering that the notice posting be read to the employees. In doing so, the Union again cites a footnote, this time in *Co-Serv, supra*, 366 NLRB 103. In *Co-Serv*, the Board agreed with the ALJ requirement of notice reading in light of the employer's substantial and pervasive unfair labor practices[3] *Id.* (citing *Postal Service,* 339 NLRB 1162, 1163 (2003)) (the Board has recognized that such a remedy may be warranted where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their section 7 rights in an atmosphere free of coercion or where the violations in a case are so egregious). It is notable, however, that Chairman Ring believed a notice reading was unwarranted where "the three unfair labor practices…are not so numerous and serious as to render the Board's standard notice posting remedy insufficient to dissipate their effects, nor do they rise to the 'egregious' level of misconduct." *Co-Serv* 366 NLRB at n.3.

Despite the number of unfair labor practices alleged by the Union here, the ALJ found that Wyman committed only a single violation that tainted the petition. (ALJ Dec. 15). According to

[3] Unlike Wyman, the employer in *Co-Serv* unilaterally and without notice or opportunity to bargain, discontinued its annual practice of increasing employees' wage ranges. The Employer further compounded this by making statements blaming the union for the lack of raises. In the instant case, as discussed above, the Respondent attempted to negotiate the annual wage increase and the Union took credit through employee notifications for the negotiations.

the ALJ, the prolonged bargaining caused dissatisfaction and tainted the withdrawal petition. (ALJ Dec. 15). There was no finding that Wyman engaged in the type of numerous, pervasive or egregious conduct that would require a notice reading. The Union is in error to suggest otherwise.

C. The Language of the Judge's Order

As full set forth in Wyman's's Exceptions and Brief in support thereof, there are a myriad of reasons why the ALJ's decision and remedies are in error.[4] Needless to say, while, not agreeing that any bargaining order or schedule is proper, Wyman believes that the ALJ's order that the parties bargain for no less than six months, as opposed to the Union's contention that the language

[4] This case is most similar to *Scomas of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). In *Scomas*, employees collected a majority decertification petition, filed it with the NLRB region for an election, and gave a copy of the petition to their employer, asking it to withdraw recognition. 849 F.3d at 1147. Before the employer withdrew recognition, the union persuaded six employees to sign a form stating they revoked their decertification signatures. *Id.* at 1153. Without those six signatures, the decertification petition lost majority support, but was still supported by well over 30% of the bargaining unit. *Id.* at 1158. The union concealed the employees' revocation from the employer (and the employee who filed for an NLRB election). The employer withdrew recognition in good faith based on the majority petition and, based on this withdrawal, the petitioner withdrew her election petition. *Id.*

Six days later, the union filed ULP charges claiming the employer unlawfully withdrew recognition because the union still maintained majority support. The Board found that the employer violated the Act and imposed a bargaining order to prevent the employer and the dissenting employees from "raising a question concerning the Union's majority status during the required bargaining period." *Id.* at 1154. The D.C. Circuit reversed the Board's bargaining order, noting that an "affirmative bargaining order is an extreme remedy, because according to the time-honored board practice it comes accompanied by a decertification bar that prevents employees from challenging the Union's majority status for at least a reasonable period." *Id.* at 1156 (quoting *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1122 (D.C. Cir. 1994)). The Court even noted that the appropriate remedy for such a situation is to order an election when more than 30% of the employees still support the petition. *Scomas*, 849 F.3d at 1156.[4]

Even if the petition did not command a majority, the ALJ here, still found 16 of the 43 employees objectively supported the Union's decertification. As more than 30% of the unit supports getting rid of the Union, there is a substantial question concerning representation that should be decided by an election. Given the still substantial opposition to the Union, imposition of a bargaining order would impermissibly undermine the Section 7 rights of the employees.

read "for a reasonable time," is appropriate.[5] Contrary to the Union's position that the ALJ's Order would lead to confusion, Wyman recognizes that the Board held in *Lee Lumber & Building Material Corp*. 334 NLRB 399, (2001) that "reasonable time" was "no less than 6 month and could be no more than a year depending on several factors, including whether the parties are bargaining for an initial contract; the complexity of the issues and the procedures adopted for bargaining; passage of time and number of bargaining sessions; presence or absence of impasse; and, proximity to agreement. *See generally*, *Lee* Lumber 334 NLRB 399. In *Lee Lumber*, the parties met no more than six times over an approximately two-year period. This was after the employees filed a decertification petition and the employer refused to bargain on that basis *before* the parties ever met at the bargaining table. *Id.* Here, the parties met 25 times, in a 14 month period, reached 10 tentative agreements and exchanged a myriad of proposals. The ALJ recognized that the Parties had made more progress in the three months preceding the withdrawal of recognition than in the previous meetings. (ALJ Dec. 4). Unlike in *Lee Lumber*, this was a mature bargaining situation.

The Respondent concedes that if a bargaining schedule were necessary in this case, the six month definitional standard set forth in *Lee Lumber* would be appropriate. The ALJ's order requiring no less than six months, is not confusing. Six months is six months. Explicit in the Order is that the parties bargain for no less than six months. The ALJ could not have been any clearer that "reasonable time" means six months. This is not a substantive deviation from the Board's standard remedy.

[5] Wyman takes no position regarding the Union's contention that the Order is improper because it does not include the proper unit description and therefore will not respond to the Union's argument.

VII. The ALJ should not have granted the Union and General Counsel's motions to strike exhibits not admitted to the record.

In its Brief in Support of its Cross-Exceptions, the Union argues that the ALJ erred in failing to grant it and the General's Counsel's motions to strike exhibits not admitted into evidence and attached to Wyman's post-hearing brief. This argument is duplicative of the motion the Union previously filed with the Board, which requested that the same exhibits be stricken from Wyman's Brief in Support of its Exceptions. Wyman properly opposed the Union's motion, but will nonetheless reiterate its arguments here.

The Union seeks to strike Exhibit A, the Regional Director's March 1, 2017 Decision to Partially Dismiss Case No. 04-CA-188990 addressed to Union counsel Nathan Kilbert; and Exhibit B, the Regional Director's October 31, 2016 approval of the Charging Party's request to withdraw portions of Case No. 04-CA-182126, addressed to Employer counsel Rick Grimaldi and copying Mr. Kilbert, and any reference thereto in the Employer's brief. Additionally, the Union seeks to have Employer Exhibit 3, amended to include page numbers, stricken. This is the first time the Union has requested that amended Employer Exhibit 3 be stricken, unlike the General Counsel who included this frivolous request in its original motion to strike. For the foregoing reasons, the Union's request is improper.

A. There is no evidence that the ALJ actually referred to the Exhibits.

As an initial matter, there is no evidence that the ALJ actually relied upon the exhibits attached to Wyman's post-hearing brief entering his decision. On the contrary, the ALJ's decision illustrates his utter failure to give these documents proper accord, as he considered issues that were not before him.

Further, the Union fails to identify a single way in which it, or any party, was prejudiced—or even affected—by the ALJ's failure to rule on the motion. As explained in more detail below,

all parties were aware of the procedural history of this case and what allegations were included in the Amended Complaint and subject to the hearing. The Union's attempt to resurrect this issue a third time without articulating a basis must be denied.

B. Judicial Notice

Federal Rule of Evidence 201 provides that a court may judicially notice a fact that is not subject to reasonable dispute because it: 1) is generally known within the trial court's territorial jurisdiction; or 2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Ev. 201.

It is well established that the Board takes judicial notice of its prior proceedings. *See The Baldwin Locomotive Works,* 80 NLRB 403 at n. 2 (1950) ("As the Board takes judicial notice of its prior proceedings..."); *Tin Processing Corporation*, 80 NLRB 1369 (1948) (denying motion to incorporate as part of the record a number of Board proceedings involving the employees of the Employer for purposes of showing the history of collective bargaining: "Since the Board takes judicial notice of prior proceedings before it, there is no necessity to incorporate such prior proceedings to establish the fact of bargaining history."). Accordingly, the prior proceedings in this matter, including what has and has not been withdrawn and dismissed, can and should be judicially noticed.

In any event, it is appropriate to take judicial notice of the *fact* that the Regional Director made these determinations, if not the truth of the information therein. *See Rivas v. Fischer*, 687 F.3d 514, 520 (2d Cir. 2012) (taking judicial notice that press coverage contained certain information, without regard to the truth of its contents). Regardless of whether the agrees with the Regional Director's prior decisions, it is undisputed that these were in fact his decisions, and the allegations therein are not at issue in this case. Accordingly, judicial notice is proper. *McCrary v.*

Elations Co., LLC, No. EDCV 13-00242 JGB OP, 2014 WL 1779243, at *1 (C.D. Cal. Jan. 13, 2014) (taking judicial notice of judicial opinions, which "are not subject to reasonable dispute"). The dismissals and withdrawals noted in Exhibits A and B unequivocally illustrate which allegations were before the ALJ in this matter. Despite the Union and General Counsel's repeated attempts to resurrect these allegations, Exhibits A and B demonstrate the fact that certain allegations are not at issue. This is appropriate for judicial notice.

The legal precedent cited by the Union is inapposite. The appended decisions by the Regional Director merely clarify the claims and provide context for the matters that were before the ALJ and are now before the Board. This is appropriate. *G.M. Masonry*, at FN 7 ("The foregoing recital is mentioned here for the sole purpose of providing an understanding of the history of this case."). Moreover, the Board acknowledged, in *Walter B. Cooke, Inc.*, 262 NLRB 74 (1982), that it was appropriate for the Board to consider a prior dismissal letter insofar as it contained factual evidence. (Discussing *APA Transport Corp.*, 239 NLRB 1407 (1979)).

The Union seems to misconstrue the issue here: the General Counsel repeatedly stated on the record, without objection from the Union, that the matters before the ALJ were limited to those allegations contained within the Amended Consolidated Complaint. (Tr. 559:13-16) (responding "correct" when the ALJ asked, "But you're not alleging that they violated the Act in any respect with regard to anything that's not specifically mentioned in the complaint?") (*See also* Tr. 113:14-25; 114:1-2; 118:25; 119:1; 251:3-5; 494:22-25; 496:23-25; 499:4-8). The Regional Director's letters simply clarify which allegations were at issue.

Finally, there is no dispute that Exhibits A and B are indeed exactly what they purport to be: decisions from the Regional Director related to the charges at issue in this case. The Union received these documents at the same time the Employer did and it cannot reasonably dispute the

authenticity of the documents. The Union's argument in its original motion regarding lack of *voir dire* therefore rings hallow. Similarly, the Union's characterization of these documents as "appearing to be" letters from the Regional Director is disingenuous at best. The source—the Regional Director and the same agency under which this matter is pending—cannot be questioned, nor can the Union's receipt of these documents. Consequently, the Exhibits are appropriate for judicial notice.

C. There is no prejudice.

Notably, there is no prejudice to the Union or General Counsel if the Exhibits are included in Wyman's post-hearing brief or any other filing. Exhibit A was indeed addressed to Mr. Kilbert, the Union's counsel. Similarly, Mr. Kilbert was copied on Exhibit B. These documents contain no surprises and, as explained more fully below, have been referenced throughout this proceeding. Therefore, there is no prejudice to any party by including them despite not being exhibits admitted during the hearing.

Conversely, the Exhibits are critically relevant to this matter, which outweighs any alleged prejudice to the Union or General Counsel. The Exhibits are illustrative of the parties' bargaining history. This is indeed relevant, as many of the Union and General Counsel's arguments relate to those charges previously dismissed and not at issue in the Amended Consolidated Complaint. The parties spent a significant amount of time discussing the allegations actually at issue, including during a pre-hearing telephone conference with the ALJ, and again at the opening of the hearing. Most importantly, the ALJ blatantly ignored the scope of the hearing, making the inclusion of these Exhibits necessary.

Additionally, whether the alleged unfair labor practices at issue tainted the withdrawal cannot be looked at in a vacuum, but must be examined by looking at the entirety of the parties'

negotiations. Therefore, the parties' bargaining history, including the determinations made prior to the issuance of the Amended Consolidated Complaint, are relevant. *See APA Transport Corp.*, 239 NLRB 1407 (1979) (Board considered prior dismissal letter insofar as it contained factual evidence for summary judgment purposes). In sum, there simply is no prejudice to the Union or General Counsel in including the Exhibits. To the extent the parties argue otherwise, any prejudice is far outweighed by the relevance of the Exhibits.

D. The Exhibits were referenced throughout these proceedings without objection.

Exhibits A and B have been referenced throughout these proceedings without objection from any party until after post-hearing briefs were filed. Accordingly, the Union (and General Counsel) have waived any right to object now.

In Wyman's March 19, 2018 Motion to Strike Paragraphs 7, 8 and 10 of the Amended Consolidated Complaint, Wyman included reference to, and large passages from, Exhibits A and B. (*See* Employer's Motion to Strike Paragraphs 7, 8 and 10 in the Amended Consolidated Complaint at Section IV(A), providing the *entirety* of Exhibit B; and Section IV(C), including substantial portions of Exhibit A). Neither the Union nor General Counsel made mention of such references at that time, nor was it objected to in the General Counsel's opposition to Wyman's motion. Tellingly, the Union filed nothing with regard to Wyman's inclusion of the procedural history of the charges at issue when moving to strike portions of the Amended Consolidated Complaint.

Further, Wyman read from or referenced Exhibit A during the hearing in this matter, again without objection from any party. (Tr. 27:13-21; 60:10-25; 305:3-11; 378:8-15). Not once did the Union or General Counsel object to reference to the Regional Director's decisions on the record, nor did they dispute that multiple allegations made by the Union prior to the issuance of the

Amended Consolidated Complaint were in fact dismissed. The procedural history has been relevant and discussed repeatedly throughout these proceedings without objection from the Union or General Counsel. Consequently, they have waived any argument to object to reference to the Exhibits now.

E. Employer Exhibit 3 with page numbers.

The Union also objects to the true and correct copy (as noted in Wyman's post-hearing brief) of Employer Exhibit 3 with page numbers added. As explained in Wyman's brief, this was done as a convenience for the ALJ, and all parties, to facilitate finding the page Wyman was referencing. Employer Exhibit 3 is a 171-page document that, as pointed out by the Union, is cited throughout the Employer's brief. Rather than ask the ALJ to search 171 pages each time he needed to reference a citation, Wyman added page numbers for ease of reference. Wyman fails to see the difference between directing the ALJ to, for example, turn to the 23rd page of the document versus providing page numbers and directing him to page 23. No "facts" are added to the record by including this document. Notably, the Union did not include this argument in its original motion, only the General Counsel did. The Union's request now, at this late date, is improper.

Further, even if the exhibit should have been stricken from Wyman's brief, striking citations thereto would have been improper. The citations included in Wyman's brief are to an admitted evidentiary document merely with page numbers added. At most, the reference to specific page numbers would be stricken, but certainly not the reference to the admitted document itself. The Union's request here is, candidly, beyond the pale.

The Union's allegation that Wyman substantively altered Employer Exhibit 3 is meritless. As made clear in its brief, page numbers—and only page numbers—were added for convenience.

Accordingly, the ALJ's failure to rule on this portion of the General Counsel's motion to strike was irrelevant.

VIII. Conclusion

As explained in Wyman's brief in support of its exceptions, the Board should reverse the ALJ's decision with respect to his determination that the petition signed by a majority to the bargaining unit was invalid, uphold Wyman's withdrawal of recognition and dismiss any alleged unfair labor practices against Wyman, thus voiding the Union's cross-exceptions as moot. In any event, the Union's cross-exceptions are without merit, based upon erroneous statements of fact and law and should be dismissed in full. In the alternative, the Board should order that an election be held so that the employees' Section 7 rights can be honored.

Dated: November 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2018, I e-filed the foregoing **RESPONDENT'S BRIEF IN OPPOSITION TO THE CHARGING PARTY'S CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** with the National Labor Relations Board's Office of the Executive Secretary, and served a copy of the foregoing document via e-mail to all parties in interest, as listed below:

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